United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B

75-7099

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE BEDROSIAN and THOMAS HAGAN, ROBERT HANDELMAN and BERNARD SHIPMAN, WALTER WILLIAMS and OTIS McGAUGHY (OMAR SEKOU TOURE), and All Others Similarly Situated,

Plaintiffs-Appellants,

vs.

JOSEPH MINTZ, Administrator, Erie County Bar Association Aid to Indigent Prisoners Society, Inc.; the ERIE COUNTY BAR ASSOCIATION AID TO INDIGENT PRISONERS SOCIETY, INC.; and CARMAN F. BALL, Justice of the Supreme Court and Presiding Judge of the Additional Special Trial Term of the Wyoming County Court, in His Representative and Individual Capacity,

Defendants-Appellees.

Calendar No. 989.

BRIEF OF DEFENDANTS-APPELLEES, JOSEPH D. MINTZ, ADMINISTRATOR, AND ERIE COUNTY BAR ASSOCIATION AID TO INDIGENT PRISONERS SOCIETY, INC.

APPEAL FROM ORDER AND JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK (CIV. 74-286) OF JANUARY 6, 1975 DISMISSING PLAINTIFFS' COMPLAINT FOR FAILURE TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

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GEORGE BEDROSIAN and THOMAS HAGAN, ROBERT HANDELMAN and BERNARD SHIPMAN, WALTER WILLIAMS and OTIS McGAUGHY (OMAR SEKOU TOURE), and All Others Similarly Situated,

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BRIEF OF DEFENDANTS-APPELLEES, JOSEPH D. MINTZ, ADMINISTRATOR, and ERIE COUNTY BAR ASSOCIATION AID TO INDIGENT PRISONERS SOCIETY, INC.

Statement of Issues

1. Does a New York State Supreme Court Justice have a right to require, as qualification for assignment of counsel to

defend a criminal indictment returned by a New York State Grand Jury, that the attorney to be assigned be admitted to the Bar of the State of New York?

2. Does an out-of-State attorney not admitted to practice in New York, who voluntarily agrees to appear and represent a defendant, have a right to the same status as assigned counsel where the Court permits the attorney to be admitted *pro hac vice?*

Statement of Case

Proceedings Below

The complaint was filed in the Western District on June 13, 1974 (CIV. 74-236) seeking "1. A declaratory judgment that the attorney-plaintiffs are entitled to compensation to the same extent as counsel appointed for indictees who are members of the New York Bar. 2. A mandatory injunction ordering defendants to appoint the attorney-plaintiffs and members of their class, pursuant to New York County Law Sec. 18-B" (8a Appendix: all references in parentheses are to a page in the Appendix unless otherwise noted.)

Joseph Mintz (Administrator) Erie County Bar Association Aid to Indigent Prisoners Society, Inc. (Society, Inc.) moved to dismiss on November 18, 1974 for failure of the complaint to state a claim upon which relief can be granted (9a). Justice Ball made a similar motion on October 17, 1974 (Justice Ball's motion to dismiss p. 1). The attorneys-plaintiffs moved for summary judgment on October 22, 1974 (32a). The Hon. John T. Curtin filed a decision on January 6, 1975 granting the motions to dismiss for failure to present a substantial federal question (14a). A judgment dismissing the complaint was filed January 6, 1975 (Item 15 Index to Record). A notice of appeal was filed January 22, 1975.

Facts

Justice Ball was designated by the State of New York Supreme Court, Appellate Division, Fourth Judicial Department, on November 9, 1971 to preside at an additional Special and Trial Term, County of Wyoming, Warsaw, New York, concerning the Attica prison riot under an executive order of the Governor issued October 29, 1971 (16a). The order was amended to provide for an additional Special and Trial Term in Erie County, June 1, 1973 (16a).

Joseph Mintz serves as the Administrator for the Erie County Bar Association Aid to Indigent Prisoners Society, Inc., which is authorized to provide representation of persons accused of crime through a plan of a bar association under the powers of Article 18-B of the *N. Y. County Law*, including Section 722 (58a). Mr. Mintz and the Society, Inc. do not assign counsel to indigent defendants; their function is to assist the Court in coordinating aspects of the program, assist assigned counsel in the preparation and processing of applications to the Court for services and expenses, and to disburse funds to assigned counsel upon receipt of an Order from the Court approving and directing payment (58a). Justice Ball was responsible for assigning most, if not all, the attorneys to defend persons indicted for crimes arising out of the Attica prison riot (58a).

At least forty-two persons were indicted for various crimes in Attica prison (48a). Upon their arraignments some defendants had attorneys; others did not and requested the Court to assign counsel; and a few defendants wanted no attorneys and decided to represent themselves (17a). Justice Ball advised each defendant "of his right to counsel of his own choice and that if he did not have sufficient funds to hire counsel, the Court would assign counsel in accordance with Article 18B of the County Law" (17a).

Among the defendants who had their own attorneys, many were admitted to the Bar of the State of New York, but some who appeared were from out-of-state and were not admitted to practice in the State of New York (17a; 46a). In certain instances where a defendant had selected an out-of-state non-admitted attorney, an application was made to have the Court order the particular attorney to be the defendant's assigned counsel, but Justice Ball refused stating that he would only assign attorneys who were duly admitted to practice in New York State (17a). Upon further application of the same defendant to permit the out-of-state non-admitted attorney to continue to represent the defendant, Justice Ball granted an application (18a) to be admitted *pro hac vice* which is provided for in the Rules of the *N. Y. Court of Appeals*, Section 520.8, wherein the Court has discretion to admit an attorney to participate in the trial or argument of any particular cause in which he may be for the time being employed.

Justice Ball advised the accuseds and the attorney-plaintiffs that they could not look to the assigned counsel program for reimbursement "because we are ready, willing and able to supply New York admitted attorneys to these defendants" (20a) (19a). Each of the attorney-plaintiffs included in this class action were retained by the defendants or volunteered their services to the defendant who selected the attorney as their desired counsel (60a). In cases where the attorney who originally appeared with the defendant was admitted in New York, Justice Ball exercised his discretion by assigning the same attorney to the defendant after a request for assigned counsel (18a).

Mr. Mintz had originally expressed some concern about availability of counsel because of a possible statutory limitation of $500 for services rendered by assigned counsel and the inability to obtain periodic payments (54a, 55a, 56a), but this was corrected by the New York Legislature in its 1974

session when it amended Section 722-b of the *N.Y. County Law* to give the Court discretion to approve greater payments and before the completion of representation (60a; *N.Y. Laws* of 1974, Chp. 566, effective May 23, 1974). Mr. Mintz was able to represent to the Court below in this action that in his opinion "there are more than a sufficient number of attorneys duly admitted to practice in New York State who can be assigned by the Court to Attica defendants who may need counsel" (61a).

The attorney-plaintiffs involved in this action are those who desired to continue to represent Attica defendants after they and their clients were advised by Justice Ball that he would only assign attorneys admitted to the New York Bar; that New York attorneys were available to represent the defendants; and that the out-of-state non-admitted attorneys should not expect to look to the assigned counsel program for payment of services or disbursements (25a).

ARGUMENT

Summary of Argument

It is the position of Mr. Mintz, Administrator, and the Society, Inc. that the assignment of counsel is solely within the discretion of the Court which has the obligation to choose competent counsel to represent an indigent person charged with the commission of a crime. The fact that Justice Ball assigned the same attorneys who originally appeared as retained counsel where they met the qualification of being admitted in New York does not mean that he "agreed to lawyers chosen by the defendants"; but only means that Justice Ball determined to exercise his discretion by accommodating a defendant's request that the same attorney be assigned.

It is within the power of a New York State Supreme Court Justice, in exercising discretion, to require as a qualification that each attorney to be assigned be admitted to practice in the State of New York. To insist upon such a qualification is not to engage in "invidious discrimination" as the out-of-state non-admitted plaintiff-attorneys contend. The out-of-state non-admitted attorneys who volunteered their services and were admitted *pro hac vice* upon the plaintiff-indictees' request have no right to a declaratory judgment and mandatory injunction requiring Justice Ball to assign them as attorneys so that they may receive the compensation provided under Article 18-B of the *N.Y. County Law* for attorneys assigned by a New York State Supreme Court Justice. Under established authority (*e.g., Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971)), the attitude of the Courts of the United States is to refrain from interfering with state functions absent a showing of extraordinary and compelling circumstances which are not demonstrated in this record.

POINT I

Plaintiff-indictees are not entitled to control the assignment of counsel. The constitutional right to representation is satisfied by the assignment of an attorney competent to defend the indictment.

The central issue is who has control over the assignment of counsel. It is Mr. Mintz's and the Society's position that it is the Court—not the defendants—which has the right and duty to assign counsel and to establish the criteria to be applied in selecting the particular attorney to be assigned.

In order for the plaintiffs to prevail in this action it would necessarily mean that an indigent defendant not only has the right to have the Court assign counsel, but the defendant also

has the right to have the Court assign counsel of his choice regardless of where he is admitted to practice. Additionally, such a holding means that in exercising his discretion a Justice of the New York State Court may not establish as a qualification for the particular attorney whom the Justice is to assign that the attorney must be admitted to practice in New York State.

Such a holding would be contrary to existing law; would violate the principles of comity and the rights of Federal and State judicial systems; and is not to the best interests of indigent defendants indicted by the State of New York.

A state has a substantial interest in regulating the practice of law within its confines. The Courts have a valid interest in regulating the qualifications and conduct of counsel, their availability for service of Court papers and their amenability to disciplinary proceedings. Thus, in *Brown v. Supreme Court of Virginia*, 359 F.Supp. 549 (1973), affirmed, 414 U.S. 1034, 94 S.Ct. 533 (1973), the Court held that a State may require an applicant for the Bar to be a permanent resident.

The Courts of New York State have a constitutional right to separately classify applicants who have taken the Bar examination and who are admitted in New York and foreign attorneys seeking admission on some other basis. There is a rational basis for making such separate classification.

> The Equal Protection Clause does not mean that a state may not draw lines to treat one class of individuals or entity different from the others. The test is whether the difference in treatment is an invidious discrimination (*Brown, supra*, 359 F.Supp. at 554) quoting from *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1000 (1973).

A fortiori, under *Brown*, Justice Ball should have the right to use as a criterion in assigning counsel that the attorney be admitted to practice in New York.

In *United States Ex Rel. Torry v. Rockefeller*, 361 F.Supp. 422 (W.D.N.Y. 1973), the Court dismissed a writ of *habeas corpus* brought by a person convicted in Niagara County Court who claimed he was denied his right to the assistance of counsel. At page 425 of the decision Judge Curtin stated that petitioner's claim that he was denied his right to the assistance of counsel comprises three contentions: "The first is that he was not allowed to be represented by the assigned counsel of his choice, Rippo." In ruling against petitioner the Court held:

> Turning to the first contention, the applicable law is stated in Davis v. Stevens, 326 F.Supp. 1182, 1183 (S.D.N.Y. 1971), as follows:
>
> > . . . while this right to counsel includes the right of an indigent defendant to have counsel appointed free of charge to him, . . . it has never been held that this right to counsel also comprehends a right of each indigent defendant to have counsel of his choice appointed for him. Rather, it is the duty of the court to appoint counsel for the indigent defendant, and unless there is good cause shown why the appointment of a particular attorney should not have been made, the defendant must accept the attorney selected by the court unless he waives the right to be represented by counsel (361 F.Supp. at 425).

In *Davis v. Stevens*, 326 F.Supp. 1182 (S.D.N.Y. 1971) (opinion by Edelstein, J.), the defendant Davis made a *pro se* application to the Supreme Court for the appointment of counsel of his choice. His complaint alleged that in Bronx County a list of attorneys is maintained for the Supreme Court for use in connection with the representation of indigent defendants in criminal proceedings. When the Legal Aid Society is not appointed to represent an indigent defendant, one of the attorneys from the list is appointed instead. The appointments are made on a rotating basis. All appointments were made by the Court. Defendants are not given the opportunity to select a particular attorney from the list.

Mr. Davis contended he had the right to the appointment of counsel of his choice regardless of whether or not such counsel was on the list. He claimed a constitutional right to be provided with counsel of his choice and that denial of this claimed right resulted in a denial of his Sixth Amendment right to counsel and his Fourteenth Amendment right to equal protection. His complaint asked that a three-judge court be convened pursuant to 28 U.S.C. Sec. 2281 to enjoin enforcement of Article 18-B of the *N.Y. County Law* which provides for assignment and compensation of counsel. Defendants included Justices of the Appellate Division, First Department and others. The Court granted defendants' motion to dismiss on the ground that the complaint failed to raise a substantial federal question. In the course of the opinion the Court pointed to "additional authority which stands opposed to plaintiff's claimed constitutional right to have appointed counsel of his choice."

> ... The Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964), as amended (Supp. V, 1970), requires each United States district court, with the approval of the judicial council for its circuit, to adopt a plan for providing representation to persons charged with crime who are unable with their own resources to obtain adequate representation. Pursuant to this statute, the Judges of the United States District Court for the Southern District of New York, this District, have adopted such a plan. Article IV of the plan, entitled Appointment of Counsel, provides specifically that a District Judge or a Magistrate, when appropriate, shall appoint counsel, and that '*** no [person] shall select his own counsel from the panel of attorneys or otherwise.' The United States Court of Appeals for the Second Circuit has adopted its own amended plan for cases before it to supplement the plan of the Southern District and that of the other district courts within the Second Circuit. Paragraph 4 of Part III of the Court of Appeals' plan provides 'The selection of counsel shall be the sole and exclusive responsibility of

> the Court, and any defendant entitled to representation under the Act [Criminal Justice Act] shall not be permitted to make the selection of an attorney to represent him from the panel or otherwise.' The plans adopted under the Criminal Justice Act by the district courts throughout the country also include similar provisions. Baker v. People, 299 F.Supp. 1265, 1267n. (S.D.N.Y. 1969). [326 F.Supp. 1183, 1184].

It is therefore recognized by both State and Federal Courts that the assignment of counsel is the sole prerogative of the Court.

In the present case Justice Ball has determined in his discretion that there should be certain criteria established in the assignment of counsel. One such criterion is that the lawyer whom he will assign must be duly admitted to practice in New York State.

The brief of the plaintiffs-attorneys in effect concedes the right of the Court to select counsel at the bottom of page seven, "Thus we do not quarrel with the general proposition that 'the choice of an assigned counsel is for the judge, not the defendant' " thereby implicitly admitting that the Court may establish criteria for the assignment of counsel. But an attempt is then made to equate a criterion used by Justice Ball - admission to the New York Bar - with claimed invidious discrimination (no blacks, Jews, Republicans, red-haired or politically active lawyers). From this false premise the brief then argues for a remedy, assuming and begging the fundamental question of whether there is invidious discrimination in the first instance. Careful reading of the authorities relied upon by the plaintiffs-attorneys justifies the conclusion that they do not support the contention of the plaintiffs-attorneys.

For example, this Court's decision in *Spanos v. Skouras Theatres Corporation*, 364 F.2d 161 (2d Cir. 1966) (*en banc*) (Friendly, J.), is quoted at length. The case held that the ap-

pearance of a California attorney in an anti-trust suit in a New York federal court did not constitute unauthorized practice. The opinion carefully noted, however, that the holding was limited to the situations where the out-of-state lawyer worked in association with a local lawyer on a federal claim, and where jurisdiction was not based upon diversity of citizenship (324 F.2d at 171) thereby emphasizing the importance of local interests.

It is difficult to understand the plaintiffs-attorneys' "argument" that their right to travel has been interfered with. In no way has Justice Ball prevented any attorney from traveling to and from New York. Justice Ball has only ruled that the plaintiffs-attorneys have no right to be assigned counsel. A similar claim was summarily rejected in *Brown v. Supreme Court of Virginia*, 359 F.Supp. 549, 561, aff'd, 414 U.S. 1034 (1973) (discussed, supra).

There is also no basis for the allegation that Justice Ball has interfered with defendants receiving an adequate defense. Mr. Mintz explained that in his opinion there are more than a sufficient number of attorneys who can be assigned (61a). This is not disputed in the record. There is nothing in the record to establish that each and every defendant does not have the opportunity to receive a highly skilled defense. The discussion at pages eleven and following of the plaintiffs-attorneys' brief about "multiplicity of charges", "bitterness and alienation of defendants", "confidence and trust in lawyers" is solely argument not based upon facts in the record and, more importantly, could only be pertinent if the courts were to hold that each defendant has an absolute right to choose and select his own attorney. Such a right does not exist under well established rules and authority discussed above.

Justice Ball's Assignment of Some Lawyers to Represent Defendants Where Lawyer Previously Retained

Issue 2 on page one of plaintiffs-attorneys' brief starts with this factual claim, "2. Where a judge agrees to the assignment of lawyers chosen by the defendants, ..." If this statement implies that Justice Ball announced a policy of permitting each defendant to choose his own attorney thereby relinquishing his discretion over the choice of assigned counsel, it is a misstatement and invites an unjustified inference from which the plaintiffs-attorneys argue.

Justice Ball merely engaged in a common practice in cases of criminal defendants who originally appear with retained counsel, but because of lack of funds the counsel is no longer retained. Often the defendant or the court requests the same attorney to act as assigned counsel, and counsel who was originally retained becomes assigned counsel. In the present case many defendants appeared with retained counsel but then asked that counsel be assigned and that the court assign the same attorney. Justice Ball granted these requests where the attorney met the criterion of being admitted in New York (18a). In making these assignments the Court did not give up its discretion to the defendants but accommodated the defendant's request to assign the same attorney who was originally retained. The opinion of Judge Curtin below recognized this practice. After stating that "The choice of assigned counsel to an indigent defendant is for the judge, not the defendant", the next part reads:

> If retained counsel is unable to proceed because his client becomes indigent, it is within the discretion of the trial judge to assign him or another attorney of the judge's choice. *Stream v. Beisheim*, 34 App. Div. 2d 329, 311 N.Y.S. 2d 542 (2d Dep't 1970) [14a]

It is the Court which has the responsibility for selection and assignment of the attorney for an indigent defendant. The Court has the right and duty to impose criteria, one of which is membership in the Bar of New York State.

POINT II

The out-of-state non-admitted attorneys who were admitted *pro hac vice* have no right to a declaratory judgment and mandatory injunction requiring Justice Ball to assign them as attorneys so that they may receive the compensation provided under Article 18-B of the N. Y. County Law for attorneys assigned by a New York justice.

The out-of-state non-admitted attorneys constituting the plaintiffs-attorneys on this appeal originally appeared as retained counsel and then a request was made that they become assigned counsel (17a) which was denied for the reasons discussed earlier in this brief. The plaintiffs-attorneys asked for and were granted admission *pro hac vice* by Justice Ball. In each instance the Court advised the attorney that he could not expect to be compensated as assigned counsel (19a, 25a).

The plaintiffs-attorneys therefore voluntarily agreed to act knowing that the Court would not treat them as assigned counsel and they would not be granted payment as assigned counsel under the authority of Article 18-G of the *N.Y. County Law*. For example, proceedings involving Attorney Ernest Goodman of Detroit, Michigan are in the record starting at page 20a. Page 41a contains his application for fees and expenses and, while attempting to reserve the right to petition the Court for a fee, he was fully advised by Justice Ball that he could not expect to be compensated (25a), and Mr. Goodman expressly acknowledged that, "In entering my appearance I advised the Court that I would undertake to

represent the Defendant in this case, whether I eventually received a fee or not."

Accordingly, the plaintiffs-attorneys decided to go forward and represent certain defendants with the full knowledge that they would not be assigned as counsel and that they could not expect to be paid. The plaintiffs-attorneys were admitted *pro hac vice* for the particular cause. *Black's Law Dictionary* (1951 Ed.) defines *Pro Hac Vice* as "For that turn; for this one occasion." The *Rules of the N.Y. State Court of Appeals for the Admission of Attorneys and Counselors at Law* gives the court the power to admit an attorney on this basis. The applicable rule is the following:

> Sec. 520.8 *Admission without examination.* . . . .
>
> (d) *Admission pro hac vice.* An attorney and counselor at law or the equivalent from another State, territory, district, or foreign country may, in the discretion of any court of record, be admitted *pro hac vice:*
>
> (1) to participate in the trial or argument of any particular cause in which he may be for the time being employed, ...
>
> [22 N.Y.C.R.R. Sec. 520.8(d) (1)]

In *Sanders v. Russell*, 401 F. 2d 241 (5th Cir. 1968), the Court held that a one-case-in-a-twelve-month period rule imposed upon admission of attorneys *Pro Hac Vice* applied by the United States District Court for the Southern District of Mississippi imposed unreasonable limits. The Court's opinion recognized that the case did not involve the right to practice in state courts and that it did involve the need for free legal services in civil rights cases (401 F. 2d at 244). The opinion also recognized that the District Court had a valid interest in regulating the qualification and conduct of counsel, their availability for service of court papers, and their amenability to disciplinary proceedings (401 F. 2d at 245).

Therefore the fact that Justice Ball made some inquiries into the background and qualifications of those plaintiffs-attorneys applying for admission *pro hac vice* is within his power before exercising his discretion. But in these instances it is the client and the attorney, not the Court, insisting that a particular attorney handle the case. This is far different from the Court assuming the responsibility for the selection. Implicit in the *Sanders* decision is a State Court's right to impose qualifications upon the attorneys it will assign. Rather than impairing any defendant's rights by reason of admitting the plaintiffs-attorneys *pro hac vice*, Justice Ball has acceded to their requests with the full advice that they could not expect to become assigned counsel. Therefore they should not be entitled to the relief demanded in the complaint: 1. A declaratory judgment for compensation to the same extent as counsel appointed for indictees; 2. A mandatory injunction ordering their appointment as counsel pursuant to Article 18-G of the *N.Y. County Law.*

POINT III

The attitude of the courts of the United States is to refrain from interfering with a state justice's discretion where the record shows no extraordinary circumstances. The criterion attached—admission to practice in New York State—does not involve "invidious discrimination" but is an accepted standard.

This Court is more than familiar with the attitude of the United States Courts which have a proper respect for state functions. The plaintiffs-attorneys have not shown extraordinary circumstances constituting a danger of immediate irreparable loss of constitutional rights, privileges and immunities. Plaintiffs-attorneys have not shown bad faith on the

part of the defendants-appellees in acting under Article 18-B of the *N.Y. County Law*. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 751 (1971).

The recognized need for proper balance in the concurrent operation of federal and state courts restrains against the issuance of injunctions against state officials engaged in the administration of the State's criminal laws. The object is to sustain "the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own laws." (See, *e.g.*, *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 at 678 (1974)).

Under the circumstances in this case where the state courts have decided that Justice Ball's decisions as acts of discretion are not subject to injunctive relief but as part of criminal matters are appealable, these principles preclude equitable intervention of federal courts (*Matter of Goodman v. Ball*, 45 A.D. 2d 16 (4th Dep't 1974), leave to appeal denied, 34 N.Y.2d 519 (1974)).

> Few doctrines are more solidly established in common law than the immunity of judges from liability of damages for acts committed within judicial jurisdiction .... This immunity applies even when the judge is accused of acting maliciously and corruptly and 'it is not for the protection of the malicious or corrupt judge, but for the benefit of the public whose interest it is that the judge should be at liberty to exercise functions with independence and without fear of consequences' *(Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 1217-1218 (1967)).

The Supreme Court in this case went on to state that it did not believe that this subtle principle of law was abolished by 42 U.S.C., Section 1983, which makes liable "any person who under the color of law deprives another of his civil rights."

> The legislative record gives no clear indication that Congress meant to abolish wholesale law or common law

> immunities. Accordingly, this Court held . . . that the immunity of legislatures for acts of the legislative role is not abolished. The immunity of judges for acts of the judicial role I think will establish, and we presume, that Congress would have specifically so provided if it wished to abolish the doctrine (*Pierson*, 87 S.Ct. at 1218).

The courts in interpreting *Pierson* upheld the concept of judicial immunity in civil right suits for damages (See, *Berg v. Cwiklinski*, 416 F.2d 929 (1968)). There has been some authority which recognizes a distinction between suits for damages and suits involving civil rights of individuals who seek equitable relief (See, *U.S. v. Clark*, 249 F.Supp. 720 (1965); *Bramlett v. Peterson*, 307 F.Supp. 1311 (1965); and *Littleton v. Berkely*, 468 F.2d 389 (7th Cir. 1972); rev'd on other grounds *sub nom.; O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974). "Rarely in this line of cases, however, has there been any real interference with the discretionary functions of a judge. In the instant case the requested relief would directly and irrefutably interfere with a discretionary judicial function " *Cheraime v. Tucker*, 493 F.2d 586 (1974) at 588.

In this case Justice Ball is not failing to exercise a mandatory non-discretionary duty, but is acting in a role which has long been held to be totally within the discretion of the trial court. Any interference with this judicial discretion is precluded under the doctrine of judicial immunity as applied to actions brought under 42 U.S.C. Section 1983 (See, *Cheraime, supra).*

As Justice Ball is protected by judicial immunity, so too is Mr. Mintz protected by official immunity in his position as a quasi-judicial officer of the Court, being the Administrator of the Erie County Bar Association Aid to Indigent Prisoners Society, Inc.

Mr. Mintz, acting in good faith on the formed belief that his ministerial duty to administer funds under Article 18-B of

the County Law was predicated upon the Court's assignment of counsel, was completely within the scope and the responsibility of his office when he refused to administer funds without prior Court approval.

CONCLUSION

The order and judgment below should be affirmed.

Respectfully submitted,

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Dated: Buffalo, New York,
April 21, 1975.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: George Bedrosian et al
v
Joseph Mintz, Administrator et al
Docket No. 75-7099

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 23 day of April, 1975 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to: each of the following:

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Richard F. Griffin, Esq.
2300 Two Main Place, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

23 day of April, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19..77